Supreme Court, U.S.
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92-1352

No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

HAROLD A. PETERSON; MARY J. PETERSON,
Petitioners

v.

SOO LINE RAILROAD COMPANY;
DCA HEALTHCARE MANAGEMENT GROUP, INC.,
Respondents

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether or not the Petersons, neither of whom are plan participants or beneficiaries of any plan of the Respondents, are by ERISA precluded their common law state causes of action for damages.

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OPINIONS BELOW

The Ninth Circuit Court of Appeals stated that disposition of the case was not appropriate for publication and it has not been published. The Ninth Circuit Court of Appeals opinion is included as Appendix A. The District Court opinion is included as Appendix B.

JURISDICTION

1. The Judgment in the Ninth Circuit Court of Appeals was entered on 15 October 1992 and is included here as Appendix C.

2. The Supreme Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

3. Pursuant to Supreme Court Rule 10(c) the question of whether persons who are not beneficiaries and are not plan participants have all common law rights pre-empted by ERISA is an important question of Federal law which has not been but should be settled by the Supreme Court. To decide the question as the Court of Appeals decided denies the Petitioners due process and equal protection of the laws as guaranteed by the United States Constitution.

STATEMENT OF THE CASE

A. Statement of Jurisdiction in the Ninth Circuit Court of Appeals

This case was originally filed in the Montana State District Court and was removed by the Respondent Soo Line Railroad to the United States District Court. It was removed pursuant to 29 U.S.C. § 1000 *et seq.* ERISA and pursuant to 28 U.S.C. § 1446(b), 28 U.S.C. § 1332, diversity of citizenship and the amount in controversy exceeding Fifty Thousand Dollars ($50,000.00).

The Magistrate Judge entered a final Judgment against the Petitioners pursuant to F.R.C.P. Rule 54. The Court of Appeals had jurisdiction under 28 U.S.C. § 636(c)(3).

B. Statement of the Case and Facts

Harold A. Peterson and his wife, Mary J. Peterson, (hereinafter Petersons) were sued by Excelsior Youth Center of Colorado for the cost of treatment and care of Mary Peterson and Joseph V. Salo's daughter, Mary Heather Salo (hereinafter Heather). The Colorado Court entered Judgment. The Petersons were then sued in Montana based on the Colorado Judgment. Petersons filed an action in the Montana State Court against Soo Line Railroad Company (hereinafter Soo Line) and DCA Healthcare Management Group, Inc. (hereinafter DCA). The

case was then removed to the Federal Court. Motion to Dismiss based on preemption by ERISA was filed and denied. Soo Line and DCA then changed attorneys. Extensive discovery was undertaken and completed and on 4 March 1991 Soo Line filed a Motion for Summary Judgment. Summary Judgment was granted on the basis that ERISA pre-empted the Petersons' common law state claims.

Petersons are neither plan participants nor plan beneficiaries (found by the Magistrate Judge and conceded by all parties). Mary Peterson was married to Joseph Salo. He was an employee of Soo Line's predecessor, Chicago Milwaukee, St. Paul, Pacific Railroad Company. He had been an active employee through 15 March 1979. In March 1979 he had a sudden and severe onset of multiple sclerosis. He continued to have certain benefits with Soo Line Railroad as did his dependent children. Over the years the children received medical care payments from Soo Line, although Soo Line maintained there was no plan or benefits available to the children after March 1980. Heather was admitted to Deaconess Hospital in Billings, Montana in April 1986. She was Sixteen (16) at the time and was having emotional mental problems. She was in Deaconess Hospital until 20 July 1986 when she transferred to Excelsior in Colorado.

Before placing her in Excelsior Petersons made inquiry of DCA as to whether Heather would be covered. Others also made inquiries. Dr. William Hague, who was Heather's treating physician and Excelsior personnel made inquiries of DCA as to whether there was coverage available for Heather's stay at Excelsior. Assurances were given. Based on those assurances Harold Peterson, who had no responsibility whatsoever for Heather's care, and Mary Peterson entered into a contractually binding responsibility for payment for her care. This was done based on historic experience in dealing with Soo Line

relative to Joseph Salo's children and the representations that were made. She would not have been placed there but for the assurances that were given. Heather's care at Deaconess Hospital in Billings, Montana was paid but when it came time to pay for the care of Excelsior, everyone was notified that there was no Plan and no coverage and there had not been since 1980. The Petersons are not educated individuals and are of very limited means. They were unable to pay anything for Heather.

REASONS FOR GRANTING THE WRIT

Soo Line and DCA have maintained that Joseph Salo's dependents (Heather) had no rights under any plan after March 1980. There was no plan. The lawsuit filed by the Petersons was not a suit to obtain a benefit for Heather Salo. It is a suit for contract implied in law, negligent misrepresentations and constructive fraud under the laws of the State of Montana. The legal basis arose because Soo Line continued to pay for the health care of the Salo children after March of 1980 after the plan ceased to exist and then making representations that there was coverage available which representations induced the Petersons to sign and become obligated under contracts with Excelsior Youth Center in Colorado.

By definition under ERISA Petersons are not participants or beneficiaries. Those terms are defined in 29 U.S.C. § 1002(7)(8) as follows:

> (7) The term "participant" means any employee or former employee of an employer, or any member or former member of an employee organization, who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer or members of such organization, or whose beneficiaries may be eligible to receive any such benefit.
>
> (8) The term "beneficiary" means a person designated by a participant, or by the terms of an employee

benefit plan, who is or may become entitled to a benefit thereunder.

Under 29 U.S.C. § 1132(a) the only person empowered to bring a civil action for civil enforcement is a participant or beneficiary.

All of the cases prior to this case have found preemption only where the persons are governmental authorities, employees, participants, or beneficiaries. In *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) this Court held that the New York Human Rights Law is preempted with respect to ERISA benefit plans only insofar as it prohibits practices that are unlawful under Federal Law.

Metropolitan Life Insurance Co. v. Taylor, 481 U.S. 58, 107 S.Ct. 1542, 95 L.Ed.2d 55 (1987) is a case that involved certain claims by an employee, participant. Employee, participants clearly have a cause of action under the ERISA, and they are limited to the remedies and rights under that law. *Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) also involved an employee making certain claims under an ERISA regulated welfare benefit plan. Clearly that employee, participant had rights under ERISA to bring an action in the Federal District Court and was limited by the act. In *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990), this Court again considered the question of whether an employee who was unlawfully discharged had his common law claim of unlawful discharge preempted by ERISA. This Court concluded that it was.

All of the foregoing United States Supreme Court cases do not involve any claim by a person who was clearly not a participant or not a beneficiary of the alleged plan.

Quoting extensively from *Shaw v. Delta Airlines*, *supra*, The United States Court of Appeals for the Second

Circuit in *Howard v. Gleason*, 901 F.2d 1154 (2nd Cir. 1990) stated as follows:

> This appeal raises the frequently litigated issue of the scope of federal preemption under ERISA, the comprehensive federal statutory scheme "designed to promote the interests of employees and their beneficiaries in employee benefit plans, *Shaw v. Delta Air Lines, Inc.* 463 U.S. 85, 90 (1983)
>
> * * *
>
> But courts have reasonably concluded, notwithstanding the sweeping effect intended for ERISA preemption, that not every state law that affects ERISA plans is preempted. Some state laws simply affect employee benefit plans in "too tenuous, remote or peripheral a manner to warrant a finding that the law relates to the plan *Shaw v. Delta Air Lines, Inc.* 463 U.S. at 100 n.21

Before its decision in this case, the Ninth Circuit Court of Appeals seemed to be in accord with the Second Circuit. The Ninth Circuit in *Martori Bros Distributors v. Jyrl James-Massengale*, 781 F.2d 1346 (9th Cir. 1986) after referring to the statute states as follows:

> 29 U.S.C. § 1144(a) states that ERISA shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan.
>
> * * *
>
> . . . that while the scope of section 5144(a) is broad, it is not all-encompassing, Scott, 754 F.2d at 1504; Lane, 743 F.2d at 1340. As the Supreme Court noted, some state actions may affect employee benefit plans in too tenuous, remote or peripheral a manner to warrant a finding that the law relates to the plan, *Shaw*, 463 U.S. at 100 n.21. Furthermore, [w]e must also presume that [in enacting ERISA] Congress did not intend to preempt areas of traditional state regulation, *Metropolitan Life Insurance Co. v. Massachusetts*, 105 S.Ct. 2380, 2389 (1985).

> The state laws that have been found to be preempted by section 514(a) because they "relate" to ERISA plans fall into four categories. First, laws that regulate the type of benefits or terms of ERISA plans. Second, laws that create reporting, disclosure, funding, or vesting requirements for ERISA plans. Third, laws that provide rules for the calculation of the amount of benefits to be paid under ERISA plans. Fourth, laws and common-law rules that provide remedies for misconduct growing out of the administration of the ERISA plan.

The Petersons in this case do not fall within any of those categories. The closest category to which they come is the Fourth Category. However, in this case there is no claim that there was any misconduct in the administration of the ERISA plan. There were commitments made and medical claims paid for Joseph V. Salo's dependents. There were representations made to the Petersons. There are implied contracts which arise by Soo Line and DCA's actions and torts committed which led Petersons to change their position to their detriment in reliance. Petersons obligated themselves to pay a monthly payment for a child in an amount which exceeded their monthly income by about One Thousand Dollars ($1,000.00). In *Perry v. P*I*E Nationwide, Inc.*, 872 F.2d 157 (6th Cir. 1989) it was found that common-law actions of fraud or misrepresentation are not preempted by ERISA. In support of its decision it cited two cases from the Ninth Circuit and stated in relevant part as follows:

> After discussing *Scott v. Gulf Oil Corp.*, 754 F.2d 1499 (9th Cir. 1985), the district court cited it as "finding that if an individual is neither a participant nor beneficiary then he does not fall within the sphere of ERISA." Because the purported misconduct of P*I*E occurred before plaintiffs became participants or beneficiaries, and because they were not suing for benefits under the plan, the district court held that

> preemption did not apply. Scott concerned the employees' loss of severance and "prospective" benefits after Gulf sold the refinery to another company which agreed to continue the employment of former Gulf Oil employees. "The conduct giving rise to the claim was the negotiation of an employment contract which prevented the existence of an employee benefit plan." The Scott court held that the plaintiffs' state law claims were not preempted because they did "not raise any issues concerning the matters regulated by ERISA." "The issues raised by the claim," stated the court, "are not different than those that would be raised by a claim that Gulf had conspired with, [the buyer] to accept . . . lower wages, claim that would clearly not be preempted by ERISA." The court also indicated that the plaintiffs' claim for prospective benefits was closely analogous to the claim in *Freeman v. Jacques Orthopaedic & Joint Implant Surgery Medical Group, Inc.*, 721 F.2d 654 (9th Cir. 1983), in which an employee brought an action alleging that his employer fraudulently induced him to waive his right to participate in a pension plan.

The Sixth Circuit Court of Appeals citing the case of *Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1209 (8th Cir.), *cert. denied*, 454 U.S. 968, 70 L.Ed.2d 384, 102 S.Ct. 512 (1981) held:

> *that preemption should apply to a state law claim only if Congress has provided a remedy for the wrong or wrongs asserted.* (Emphasis added)

In this particular case as the Magistrate Judge pointed out, there is no remedy for the Petersons if their cause of action is preempted by ERISA. In this particular case there were representations made, there are implied contracts which arise by Soo Line and DCA's actions and torts committed which lead Petersons to change their position to their detriment in reliance upon statements and representations. Petersons cannot be left without a remedy. The suggestion that they may be left without a

remedy violates the ancient revered maxim, *ubi jus, ibi remedium* (where there is a right, there is a remedy), *Missouri-Kansas-Texas R. Co. et al. v. Randolph et al.*, 183 F.2d 996 (8th Cir.1950), *Rekant v. Desser*, 425 F.2d 872 (5th Cir. 1970). It has been suggested that:

> There are two fundamentals of the common law, which are essentials of that due process of law which is guaranteed by the Constitution. Where there is a right there is a remedy, *Ashby v. White, 1 Salkeld, 19 . . . Metropolitan Railway Receivership*, 208 U.S. 90, 50 L.Ed. 403, 28 S.Ct. 219 (1907)

The United States Supreme Court has consistently followed some variation of the maxim, *Rawson v. Sears Roebuck & Co.*, 822 F.2d 908 (10th Cir. 1987).

Further, any relation to the ERISA plan maintained by Soo Line is *TOO TENUOUS, REMOTE OR PERIPHERAL* to find that the claims relate to the plan. Indeed Soo Line maintains there was no plan. In the case of *Sorosky v. Bowles*, 326 F.2d 794 (9th Cir. 1987) the Ninth Circuit Court of Appeals found that even though Sorosky was an employee that certain of his state law claims for breach of contract were not preempted by the ERISA preemption clause.

The claims of the Petersons clearly sound in tort or implied contract. Their common law state causes of action are no different than any other contracts or torts committed by Soo Line of DCA. The fact that they committed the torts or created an implied contract with respect to a nonexistent plan is at best a tenuous, remote or peripheral reference to a plan.

To deny the Petersons is to deny them due process and equal protection of the laws as guaranteed by the United States Constitution.

CONCLUSION

For all of the reasons set forth above, the writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-35659

D.C. No. CV-89-00112-RWA

HAROLD A. PETERSON; MARY J. PETERSON,
Plaintiffs-Appellants,

v.

SOO LINE RAILROAD COMPANY;
DCA HEALTH CARE MANAGEMENT GROUP, INC.,
Defendants-Appellees.

Appeal from the United States District Court
for the District of Montana
Richard W. Anderson, Magistrate Judge, Presiding

Argued and Submitted October 9, 1992
San Francisco, California

MEMORANDUM*

[Filed Oct. 15, 1992]

Before: BROWNING, THOMPSON and KLEINFELD, Circuit Judges.

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

OVERVIEW

In this diversity action, Harold A. Peterson and Mary J. Peterson ("the Petersons") appeal the district court's summary judgment holding that their state law claims were preempted by the Employee Retirement Income Security Act, 29 U.S.C. § 1001 et seq. (1985) ("ERISA"). The Petersons further contend that they were improperly denied an opportunity to amend their complaint to add additional state law claims. We have jurisdiction under 28 U.S.C. § 1291 (1966), and we affirm.

DISCUSSION

Summary judgment is "appropriate only when no genuine issue of material fact exists and the moving party is clearly entitled to prevail as a matter of law." *Green v. Los Angeles County Superintendent of Schools*, 83 F.2d 1472, 1475 (9th Cir. 1989). Within the context of this case, if ERISA preempts the Petersons' state law claims, then the defendants are entitled to summary judgment.

" '[T]he question whether a certain state action is preempted by federal law is one of congressional intent.' " *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45 (1987) (quoting *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 208 (1985)). ERISA's preemption provision is "deliberately expansive, and designed to 'establish pension plan regulation as exclusively a federal concern.' " *Pilot Life*, 481 U.S. at 46 (citation omitted). Moreover, it has recently been described by the Supreme Court as "conspicuous for its breadth." *FMC Corp. v. Holliday*, 498 U.S. ——, ——, 111 S. Ct. 403, 407 (1990). It provides for federal preemption of "any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a) . . . ." 29 U.S.C. § 1144(a) (1985) (emphasis added). The question on which this appeal turns, then, is whether the Petersons' state law claims "relate to" Soo Line Railroad Company's ("Soo Line") employee health care plan.

The Petersons argue that they are claiming damages which they suffered because they relied on statements made by representatives of DCA Health Care Management Group ("DCA"), rather than benefits due under Soo Line's employee benefit plan. As a consequence, they contend their claim does not relate to Soo Line's plan and is not preempted by ERISA. We understand this argument, but we reject it.

State law claims which "arise from the administration of [an ERISA governed] plan[] . . ." are preempted. *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1504 (9th Cir. 1985); *see also Greany v. Western Farm Bureau Life Ins. Co.*, 1992 U.S. App. LEXIS 20462 (9th Cir.). In determining whether a claim is preempted, it is necessary to decide whether "the conduct challenged . . . was part of the administration of an employee benefit plan." *Scott*, 754 F.2d at 1505.

In *Greany*, the plaintiff had left the defendant's employ on July 31, 1983, believing his family was covered by the defendant's group health plan until August 31, 1983. In fact, the coverage terminated August 1, 1983. There was, however, at least one notice from the insurer to the plaintiffs stating that coverage terminated August 31, 1983. Unfortunately, the plaintiff's wife gave birth prematurely in the interim, to a baby that needed extensive medical care. When the insurer refused coverage, the plaintiff brought suit asserting several common law causes of action.

In analyzing the case, we noted that despite attempts by the plaintiff to recharacterize the relationship between the parties, "[i]n reality, the Greanys challenge[d] the administration of ERISA plan benefits, . . ." *Greany v. Western Farm Bureau Life Ins. Co.*, 1992 U.S. App. LEXIS 20462. We said this was so because the employer's conduct "was merely a continuation of the duties it has as an employer in providing the group plan." *Id.* As a result, the state claims were preempted by ERISA.

Similarly, in this case, the conduct challenged was part of the administration of an ERISA plan. DCA's repre- have relied on, were made, if at all, while administering Soo Line's employee benefit plan. Soo Line had hired DCA to administer its plan, and that is how the Petersons came into contact with DCA. Mary Peterson did not call DCA at random to request assistance with Heather's medical bills. She called it to ask about coverage because she thought that Heather was a beneficiary under Soo Line's plan. DCA's answers to Mary Peterson's inquiries, regardless of their substance, were thus provided in furtherance of its duty to administer the plan. As a result, as in *Greany*, any causes of action which arise from DCA's answers, as the Petersons' claims surely did, necessarily relate to the ERISA-governed plan and are therefore preempted by ERISA.

Moreover, where the existence of an ERISA-governed plan is a "critical factor" in establishing a state law claim, ERISA preempts it. *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, ——, 111 S. Ct. 478, 483 (1990). In *Ingersoll*, the plaintiffs had filed a state law wrongful discharge claim alleging that their employer fired them to avoid paying benefits which would otherwise have become due. The Court held that, as the benefit plan's existence was a critical factor in their claim, the claim related to the plan and ERISA preempted it.

In the present case, the relation between the state law claims and the benefit plan is even closer. Here, the gravamen of the Peterson's state law claims is that they relied on DCA's statements and suffered damages as a result. Even if DCA made the statements alleged, the Petersons' cause of action requires the existence of a plan because it requires their reliance to have been reasonable. *See Trad Industries, Ltd. v. Brogan*, 246 Mont. 439, 446 (1991) (dicta); *Keil v. Glacier Park, Inc.*, 188 Mont. 455, 462 (1980) (dicta); *see also* Restatement of Contracts § 90 (1932). If the Petersons did not believe Heather was covered by the plan, no reliance on DCA's promises

to pay for her health care could possibly have been reasonable. Consequently, as in *Ingersoll*, "the existence of a . . . plan is a critical factor in establishing liability under the State [claims]" and the state claims are thus preempted.

Despite the relationship discussed between the Petersons' state law claims and the Soo Line benefit plan, the Petersons argue that neither of them is either a participant in or a beneficiary of the Soo Line plan as defined by 29 U.S.C. § 1002(7), (8) (1985). They contend that as a result, if they are denied their state law claims they will be left with no remedy. Thus, they argue, their state law claims cannot be preempted.

In the first instance, it may be that if benefits were due to Heather, she had a cause of action under ERISA. The Petersons' argument, however, must be rejected for an even more fundamental reason. As this court has previously held, "[t]here is simply no reason to assume that Congress intended ERISA's preemption reach to be coextensive with the Act's civil remedial scheme." *Olson v. General Dynamics Corp.*, 591 F.2d 1123 (9th Cir. 1991); *see also Porcaro v. The Colonial Life Insurance Co. of America*, 1991 U.S. Dist. LEXIS 15800 (W.D. Va.). Preemption of a party's common law remedy is not dependent on the existence of an ERISA remedy.

Finally, the Petersons contend they should have been allowed to amend their complaint and that the district court improperly denied their motion to do so. We disagree. Based on the foregoing analysis, any additional state law claims for benefits which were denied under the plan, or for damages because the benefits were denied, would be preempted by ERISA. As a result, the Petersons' proposed amendment would be futile. Futility being a proper ground for refusing to allow an amendment, *Hurry Up Retirement Fund Trust*, 648 F.2d 1252 (9th Cir. 1981), the district court's denial of the motion to amend was proper.

AFFIRMED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
BILLINGS DIVISION

Cause No. CV 89-112-BLG-RWA

HAROLD A. PETERSON and MARY J. PETERSON,
Plaintiffs,

vs.

SOO LINE RAILROAD COMPANY and
DCA HEALTHCARE MANAGEMENT GROUP, INC.,
Defendants.

MEMORANDUM AND ORDER

[Filed May 8, 1991]

Presently pending before the Court are defendants' motions for summary judgment filed pursuant to Rule 56, Fed.R.Civ.P., regarding a controversy arising from health care benefits under an employee benefit plan, defendants' motions to exclude the expert testimony of Walter R. Fairfax, M.D., and James Brooks, as well as plaintiffs' motion to amend their complaint in order to add the theory of negligence. Having considered the briefs filed on the matter, the documentation in support thereof, the arguments advanced by the respective parties in open court May 1, 1991, and for the reasons advanced below, the Court grants defendants' motions for summary judgment, deems defendants' motions to exclude witnesses as moot and denies plaintiffs' motion to amend the complaint.

I.

BACKGROUND

Joseph V. Salo, former spouse of plaintiff Mary J. Peterson, was employed by Milwaukee railroad from 1954 until 1979, when he left employment due to disability. During his employment and at the time of his disability, Mr. Salo and his dependents, to include Heather Salo, were covered by the Milwaukee's health care program. Coverage extended until Mr. Salo became eligible for Medicare which occurred in March of 1980.

In 1985, Milwaukee was purchased and absorbed by Soo Line Railroad Company which assumed certain employee benefits including the health care program at issue. As a self-insurer, Soo Line contracted out to DCA Healthcare Management Group, Inc., to handle and administer claims under the Soo Line plan.

While Mr. Salo's coverage eligibility under the Milwaukee plan was to have ceased in 1980, he had been, mistakenly, carried over under the Soo Line plan. The mistake was discovered in June of 1986, and Soo Line informed DCA that Mr. Salo's benefits were thereby terminated. The Petersons were not informed of the termination of benefits at that time.

Mr. Salo's daughter, Heather, had developed mental problems requiring special treatment. Mary and Harold Peterson, Heather's mother and step-father, signed an Agreement for Private Placement of Heather with the Excelsior Youth Center, Inc., in Aurora, Colorado. Excelsior is a residential care facility. The agreement provided:

> The Parent/DCA Health Care Management shall pay Excelsior monthly payments of Two Thousand Six Hundred and Seventy-Four Dollars ($2,674.00) on or before the 15th of the month following the month in which services were provided.

The Petersons also signed an Enrollment Agreement which provided:

> The parent, guardian and/or agent signatory hereto agrees to pay fees as contracted for per month for the services provided by Excelsior, . . .

Prior to the placement, plaintiffs allege that they contacted DCA and were assured that treatment of Heather, as Mr. Salo's dependent, would be covered under his employment health care program. In Mary Peterson's deposition, she testified that she understood that by signing the agreement, she would be held personally liable for payment to Excelsior should the plan not pay.

Heather was placed in Excelsior in July of 1986 through 1987. The cost of her treatment was $26,257.32. The plan did not pay the cost of treatment, and a judgment was eventually entered in favor of Excelsior and against plaintiffs for the principal sum, interest and costs totaling $33,856.20.

On May 24, 1989, plaintiffs filed a complaint against the above-named defendants, as the self-insurers and administrators of the plan, which the District Court for the Thirteenth Judicial District, Yellowstone County, under various alternative theories to include breach of contract, both express and implied, promissory estoppel, laches and breach of the implied covenant of good faith and fair dealing. The case was removed.

The defendants filed separate motions for dismissal of the complaint under Rule 12(b)(6), Fed.R.Civ.P., asserting that, since the action comes within the purview of the Employee Retirement Income Security Act (ERISA), 29 U.S.C. Section 1001, et seq., plaintiffs failed to exhaust their remedies under ERISA, plaintiffs lacked standing to sue under ERISA and plaintiffs' state law claims were preempted under ERISA.

The Court issued its memorandum and order on February 23, 1990. Because plaintiffs conceded that they

lacked standing to sue under ERISA since they were not beneficiaries or participants in the health care plan, see 29 U.S.C. § 1132(a)(1), this Court deemed the exhaustion of remedies argument raised by defendants moot. It was noted that plaintiffs were asserting their action under Montana law based upon representations made independent of the plan in question. This Court denied the motion to dismiss and stated:

> Whether plaintiffs are able to factually establish the existence of an implied contract and breach thereof, without reference to or reliance upon the existence of the health care program, are issues which properly await resolution at a later stage of these proceedings.

Defendants now move this Court for summary judgment based primarily upon the assertion that plaintiffs' claims are preempted under (ERISA), 29 U.S.C. § 1001, et. seq. Plaintiffs oppose the motion and argue that their claims are based upon certain representations which are sufficiently unrelated to the benefit plan and, thus, were insulated from the preemptive effect of ERISA.

II.

DISCUSSION

Rule 56(c), Fed.R.Civ.P., provides that summary judgment is appropriate if the pleadings and other documentation "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Also, *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1985). As provided in *T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987), the moving party has the initial burden to identify portions of the record which it believes would establish an absence of a material fact. Once accomplished, the burden shifts to the party opposing the motion to "set forth specific facts showing that there is a genuine issue for trial." *Kaiser*

Cement Corp. v. Fischbach & Moore, Inc., 793 F.2d 1100, 1103-04 (9th Cir.), cert. denied, 479 U.S. 949 (1986). Should reasonable doubt exist as to genuine issues of material fact, such must be resolved against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). A material fact has been defined as:

> [O]ne that is relevant to an element of a claim or defense and whose existence might affect the outcome of the suit. The materiality of a fact is thus determined by the substantive law governing the claim or the defense.

T.W. Electrical Services, 809 F.2d at 630 (citations omitted).

As noted by plaintiffs in their motion to amend the complaint, the facts in this case have been fully developed. The disputed facts are those regarding alleged representations made to plaintiffs regarding coverage for Heather's care at Excelsior. Even assuming arguendo that such representations were made to plaintiffs, their claims must fail under the applicable law.

ERISA provides that its sections, "shall supersede any and all State laws insofar as they may now or hereinafter *relate to any employee benefit plan.*" (Emphasis supplied.) 29 U.S.C. § 1144(a). State law is defined under the Act as "all laws, decisions, rules, regulations or other State action having the effect of law, of any State." 29 U.S.C. § 1144(c)(1).

While this preemptive provision is to be broadly construed, *Ingersoll-Rand Co. v. McClendon*, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990); *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 522-25 (1981), the Court notes that it is not all-encompassing. *Martori Bros. Distributors v. James-Massengale*, 781 F.2d 1349, 1356 (9th Cir.), cert. denied, 479 U.S. 949, 1018, modified, 791 F.2d 799 (1986); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987). "A law 'relates to' an employee benefit plan, in

the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97 (1983).

ERISA preempts state remedies which either directly or indirectly relate to an employee benefit plan, *see Dependahl v. Falstaff Brewing Corp.*, 653 F.2d 1208, 1215 (8th Cir.), cert. denied, 454 U.S. 1084 (1981), so long as the relationship is not "too tenuous, remote or peripheral." *Shaw*, 463 U.S. at 100 n. 21. Preemption is appropriate where the state claims raised involve benefits relating to past employment. *Scott v. Gulf Oil Corp.*, 754 F.2d 1499, 1505-06 (9th Cir. 1985). *See, also, Settles v. Golden Rule Life Ins. Co.*, 927 F.2d 505 (10th Cir. 1991). Only where the state claims have no such relationship will preemption be deemed inappropriate. *Sorosky v. Burroughs Corp.*, 826 F.2d 794, 800 (9th Cir. 1987).

Here, the record is replete with references to and reliance upon the plan at issue. The complaint itself states that defendants were contractually obligated to pay for the health care of Heather at Excelsior upon several theories to include:

> A. That there was an *express health care contract* which provided for benefits for Mary Heather Salo.
>
> . . .
>
> C. The *contract for health care* of Mary Heather Salo is established by past consideration *related to the employment* of Joseph V. Salo by the Milwaukee Road.
>
> . . .
>
> G. There is a contract arising by reason of long term course of action wherein the Defendant Railroad has provided health care payments for the children of Joseph V. Salo without question until July 1987.
>
> . . .

(Emphasis supplied).

Correspondence, dated September 8, 1988, directed from plaintiffs' counsel to the manager of the Benefits Administration for Soo Line stated:

> The program at Milwaukee Road at the time Joe Salo became disabled was that he would continue to be covered for medical expenses and his dependents would continue to be covered . . .

Also, correspondence, dated August 12, 1987, directed from plaintiffs' counsel to the same stated:

> Our firm has been retained by Mary Salo Peterson with respect to the medical group coverage for her family which was issued under her previous husband, Joseph V. Salo.

Further, plaintiffs, in their brief, set forth the following:

> Certainly the existence of a medical plan and the course of conduct of the Defendants are part of the facts which establish reliance on and form a portion of the factual representations made to the Plaintiffs.

From these references to the health care plan, as well as the facts of the case presented by the parties, the Court can make no other finding than that plaintiffs relied on the benefit provisions of the plan as it related to the medical care received by Heather Salo. The finding is made notwithstanding any other alleged representation that plaintiffs may have relied upon in asserting their common law claims.

Having established that plaintiffs did indeed rely upon and relate to the health care plan at issue in asserting their claims, the Court's attention then turns to the legal effects of reliance on the claims asserted in regard to preemption. The Ninth Circuit has held that ERISA preempts various common law theories to include those of contract implied in fact, breach of contract, fraud, promissory estoppel, estoppel by conduct and deceit. *Blau v. Del Monte Corp.*, 748 1348, 1356-57 (9th Cir. 1984).

In fact, state laws which authorize causes of action for the improper handling of claims under a benefit plan have been held to be directly connected with the employee benefit plan, and, thus, subject to the preemptive ambit of ERISA. *Russell v. Massachusetts Mut. Life Ins. Co.*, 722 F.2d 482, 487-88 (9th Cir. 1983). *See, also, Lea v. Republic Airlines, Inc.*, 903 F.2d 624, 632 (9th Cir. 1990).

While the Court is cognizant of the fact that plaintiffs' claims lie within the statutory provisions of ERISA and that, since they are neither plan participants nor plan beneficiaries, they have no standing to bring a grievance under the Act, plaintiffs' claims, including their claim for negligent misrepresentation proposed in their motion for amendment of the complaint, must fail as preempted under ERISA. The amended claims most certainly relate to Mr. Salo's employee benefit plan and are centered around Heather Salo's coverage as a beneficiary thereunder. The misrepresentations, if any, relate to the plan.

The Court notes that the ruling is harsh and leaves plaintiffs without a remedy. However, it has no choice but to rule in accord with the expansive sweep of the preemption effect of ERISA as intended by Congress and as interpreted and upheld by the Ninth Circuit Court of Appeals and the United States Supreme Court.

Accordingly, IT IS ORDERED:

1. Defendants' motions for summary judgment are granted.

2. Plaintiffs' motion to amend the complaint is denied.

3. Defendants' motions to exclude expert testimony are deemed moot by the ruling in the case.

DONE AND DATED this 8th day of May, 1991.

/s/ Richard W. Anderson
United States Magistrate Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 91-35659
CT/AG#: CV-89-00112-RWA

HAROLD A. PETERSON; MARY J. PETERSON,
Plaintiffs-Appellants
v.

SOO LINE RAILROAD COMPANY;
DCA HEALTHCARE MANAGEMENT GROUP, INC.,
Defendants-Appellees

Appeal from the United States District Court
for the District of Montana (Billings)

JUDGMENT

[Filed Nov. 13, 1992]

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana (Billings) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered: 10/15/92